

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-1735

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket 74-1735

EMPIRE TRANSPORT, INC., as owner
of the STEAMSHIP POTOMAC,

Plaintiff-Appellant,

—against—

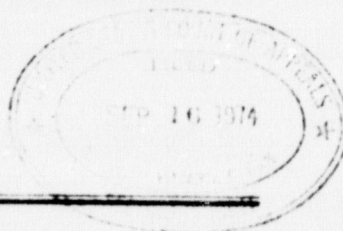
UNITED STATES OF AMERICA,

Defendant-Appellee.

BRIEF FOR PLAINTIFF-APPELLANT

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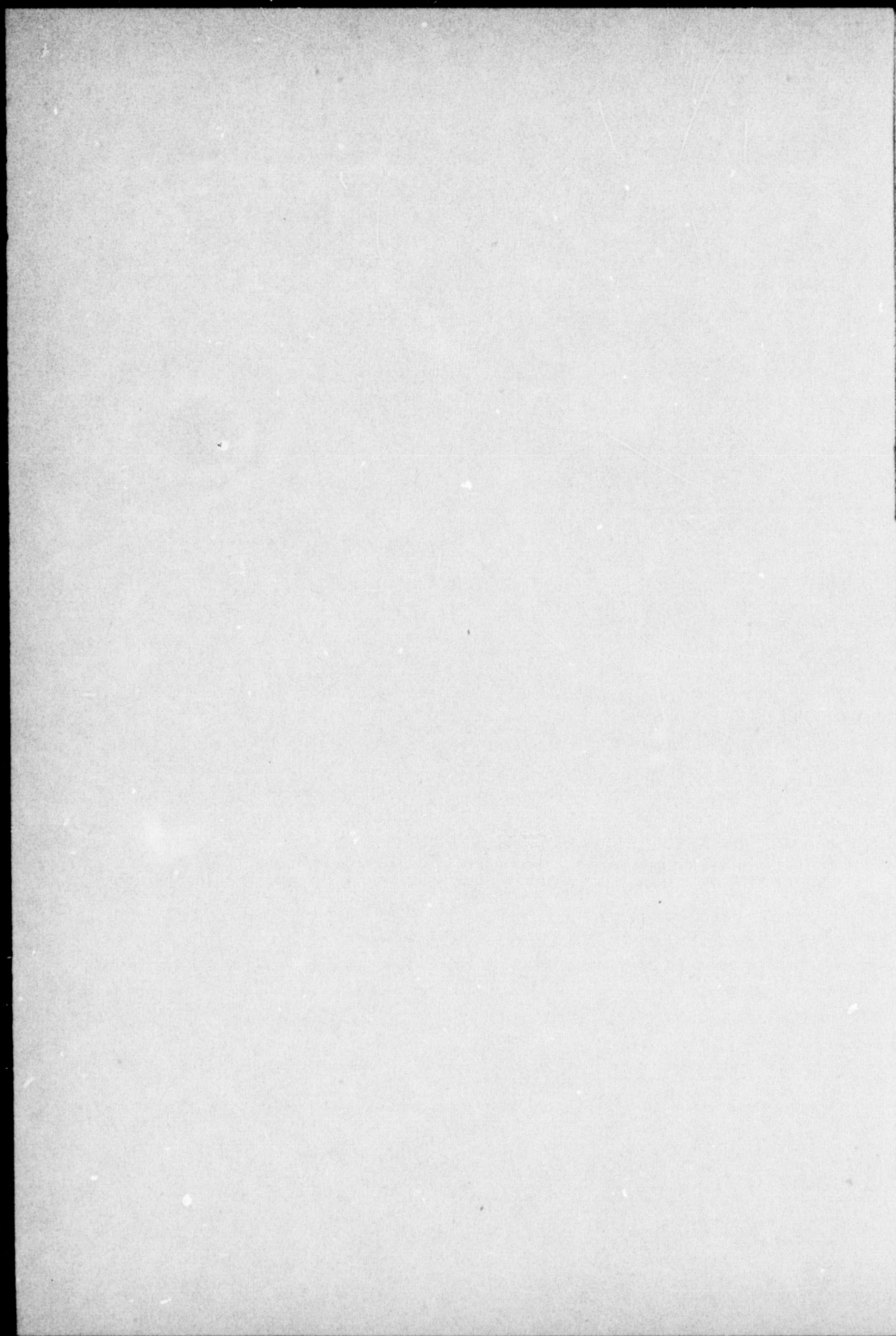


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UNITED STATES OF AMERICA,

Defendant-Appellee.

BRIEF FOR PLAINTIFF-APPELLANT

Statement of the Case

This is an appeal by Empire Transport, Inc. owner of the steamship POTOMAC from a judgment entered on March 26, 1974 (A. 591a)* in the United States District Court for the Southern District of New York pursuant to an Opinion by the Honorable Harold R. Tyler, Jr., sitting in Admiralty without a jury, entered March 26, 1974 (A. 581a-590a) dismissing the complaint against defendant-appellee, United States of America with costs.

* A. refers to Joint Appendix.

The Issues Presented for Review

(1) Did the Court below err in failing to hold that the faulty chart upon which POTOMAC's navigators relied was the sole proximate cause of the stranding.

(2) Did the Court below err in failing to find that the faulty chart was due to defendant-appellee's negligence.

(3) Whether the Court below erred in failing to hold that defendant-appellee was negligent in that it did not issue a Notice to Mariners warning that the chart was faulty and that the buoyage system was opposite to the system used in waters of the United States.

(4) Did the Court below err in concluding that POTOMAC's navigators were negligent notwithstanding that they relied on the latest navigational chart and information published by the defendant-appellee for the port of Casablanca.

(5) Is the Court's finding that chart N.O. 51220 was the preferable chart to use entering Casablanca Harbor clearly erroneous.

(6) Is the Court's finding that POTOMAC's master could have determined the Moroccan buoyage system from Bowditch clearly erroneous.

(7) Is the Court's finding that the POTOMAC was proceeding at nine knots clearly erroneous.

Statement of the Facts

In the afternoon of February 26, 1972, the American Flag, tramp steamship POTOMAC, bulk carrier of 572 feet length, owned by plaintiff-appellant Empire Transport Inc. (hereinafter Empire) and under a voyage charter

to an agency of the Moroccan Government and laden with a full cargo of bulk wheat with a draft of 32 feet—6 inches forward and 33 feet aft stranded at the entrance to Casablanca Harbor, Morocco (A. 192a). The weather was clear, visibility good, wind from the southwest—force 3 on the Beaufort Scale (A. 463a, Exh. "E").

The navigating charts for the voyage were delivered to the vessel before she sailed from her loading port in the U.S. Gulf for Casablanca and included a chart issued by the Defense Mapping Agency, (DMA), formerly known as the U.S. Naval Oceanographic Office (N.O.) and the United States Naval Hydrographic Office (H.O.) for Casablanca Harbor, identified as N.O. 51222; Second Ed., Mar. 1951; revised 5/23/66; corrected through Notice to Mariners No. 49 dated December 11, 1971. (A. 461a, Exh. "D"). There were no relevant corrections to the chart published during the period from December 11, 1971 to February 26, 1972 (A. 163a-5a). POTOMAC had on board the "Sailing Directions" for Morocco published by the H.O. Office in 1952 to which changes were made; the latest "Change 13" corrected the publication through Notice to Mariners number 11 of 14 March 1970 (A. 464a-71a, Exh. "H"). The defendant-appellee, United States of America, (hereinafter United States) established and maintained DMA and its predecessors to furnish mariners with charts and nautical publications for navigating purposes (A. 174a; 10 U.S.C. § 7391).

In February 1970, United States' employee, Anderson, while preparing "Change 13" to the Sailing Directions H.O. 51 (A. 464a, Ex. "H"), using information received by DMA, determined that the end of the submerged section of the Jetée Delure extended about 400 yards from the visible end

of the Jetty (A. 366a, A. 305a, Exh. 2, difference between positions marked PM 3182 and PM 3550). He established that the visible end of the Jetty extended further than depicted on N.O. 51222 and that the submerged extremity was located about 400 yards to the east of the visible end of the Jetty (A. 305a, Exh. 2, PM 3182, Exh. 2, position marked PM 3550 (A. 374a-5a). The difference between the length of the Jetty on N.O. 51222 and the French Chart showing the Jetty to be longer on the French Chart was noted by United States' employee, George Uber, a cartographer, when he compared the French Chart with N.O. 51222 on November 2, 1971 (A. 461a, Exh. "D"; A. 313a, Exh. 13; A. 330a-1a).

An inspection of the Jetty, made by Captain Le Chartier the American Bureau of Shipping (ABS) representative in Casablanca after the stranding, showed that the information used by Anderson to determine the length of the Jetty was correct and that the visible end of the Jetty was about 90 meters longer on the French Chart than on N.O. 51222 (A. 64a, A. 315a, Exh. 13-A—position marked "3185"). The ABS representative also made an underwater survey which revealed that there were large blocks extending to a point beyond the half way point between the visible end of the breakwater and buoy CA5 on the French Chart (A. 64a-7a, Exh. 13-A—position marked "A").

"Change 13" to the Sailing Directions was completed by Anderson almost two years before the stranding of the POTOMAC and contained a revised text for "The Harbor of Casablanca" which stated:

"Jetée Delure (Jetée Moulay Yousef), a mole extended by a breakwater which shelters the port northward ex-

tends about 2 miles northeastward from the western part of the city of Casablanca; the outer extremity of the breakwater is submerged for a distance of 400 yards and has depths of $1\frac{1}{2}$ fathoms increasing seaward to $5\frac{1}{2}$ fathoms." (A. 385a-6a, A. 469a, Exh. "H").

Copies of the written text were distributed to the chart section and Notice to Mariners sections (A. 55a, 110a). Chart N.O. 51222 was not corrected prior to February 26, 1972 to incorporate the additional 90 meters on the visible portion of the breakwater or the 400 yard submerged section.

A 6 fathom curve around the end of the breakwater on chart N.O. 51222 delineates the area where there is 36 feet of water or more from the area where there is less than 36 feet of water (A. 15a-18a, 161a-2a, A. 460a, Exh. "B"—item R). The end of the breakwater is defined by the standard chart symbol for an area where work is in progress or where there is construction (A. 147a, 458a—Bowditch, Exh. "B"—item G-49).

The depth of water between the 6 fathom curve and buoy CA5 on N.O. 51222 is at least 6 fathoms (36 feet) and at the position where the POTOMAC stranded more than 9 fathoms (54 feet) at lower low water, the chart datum (A. 18a-20a, 296a-7a, A. 461a, Exh. "D").

Chart N.O. 51222 shows a black buoy designated CA5 about 800 yards from the visible end of the breakwater (A. 461a, Exh. "D"). This is the standard chart symbol for a "port-hand buoy (entering from seaward)", "approved for use on nautical charts published by the United States of

America" (A. 452a [p. 978], 459a, Bowditch, Exh. "B"—p. 992, item 11-16 [first paragraph], A. 457a, 147a-8a, 198a). The chart does not show a difference between the buoyage system in Morocco and the buoyage system in the United States (A. 20a-1a, 198a, 303a-4a). The Sailing Directions, Chapter One, refers to buoyage and contains an explanation for the buoyage system for Spain and Portugal but makes no reference to the system of buoyage used in Morocco (A. 467a, Exh. "H", pp. 7-8; A. 193a, 303a-4a). The three different buoyage systems in use are described in Bowditch but the specific system used in each country is not shown (A. 450a-6a, Exh. "B"; A. 145a-6a).

The system used in Morocco was published on the reverse side of a disposable "Pilot Chart" issued for March 1967 (A. 26a, 153a, 170a, 192a-3a, 327a, Exh. 103). The information on the reverse side of the pilot chart was not incorporated in "Change 13" of Chapter One of the Sailing Directions nor was it published by DMA or its predecessors in any other publication available to a mariner from DMA (A. 146a-7a, 150a, 198a, 261a).

POTOMAC's chart (Exh. "D") outlined a prohibited anchorage eastward from the end of the breakwater to the east of buoy CA5 and north of the buoy for about one-half a mile, marking a fairway into Casablanca Harbor (A. 253a-4a, 262a-3a, 299a-300a, 398a, Exh. 111).

The first edition of the Sailing Directions for Casablanca contained the following warning to mariners:

"Buoys.—A lighted whistle buoy has been established off the new construction works of the Jetee Delure. It is dangerous to pass between the new extension and the buoy." (A. 400a)

A similar warning was not incorporated in "Change 13" (A. 496a-71a, Exh. "H"). Both the British and French Sailing Directions warn mariners not to pass between buoy CA5 and the Jetty (A. 318a-22a).

United States mariners rely on DMA to furnish charts and nautical publications (A. 174a).

POTOMAC's master, prior to arrival at Casablanca, read the DMA Sailing Directions and examined the chart for Casablanca Harbor (N.O. 51222) (A. 181a-2a). The chart was the latest chart with latest corrections available from DMA. He noted that there was an underwater extension to the breakwater from his reading of the Sailing Directions and examination of the chart (A. 181a-3a). The chart was corrected to December 11, 1971, almost two years later than the Sailing Directions and he assumed that the chart was the most accurate information available to him and that any work on the Jetty was confined to the area delineated by the standard chart symbol for work in progress (A. 182a, 224a-5a, 519a-30a). The Sailing Directions did not say nor did the chart show that the work in progress extended beyond the area as set forth on the chart or the 6 fathom curve around the end of the Jetty.

About 48 hours before POTOMAC's arrival at Casablanca, her master sent an ETA for 1600 hours, February 26 and also advised that her deepest draft was 33 feet, 5 inches. He requested the best anchorage area while awaiting entry and had in mind slowing down to arrive on Sunday before high water (A. 485a). He was advised that the pilot would board at buoy CA5 (A. 481a-2a). At 1305 hours, February 26, the master radioed his ETA as 1530 hours and again requested information on the best anchorage area (A.

483a). On receipt of the vessel's ETA for 1530 hours, the agent called the pilot station and harbor authorities and advised them of the vessel's 1530 ETA (A. 568a). When the pilot station advised the agent that they could not obtain a reply from POTOMAC on VHF radio, her agent requested POTOMAC to call the pilot station on the radio telephone (A. 567a). The POTOMAC was not equipped with a VHF radio and could not reach the pilot station by radio telephone (A. 201a, 204a-5a).

At 1530 hours, February 26, 1972, POTOMAC approached Casablanca from the west on her voyage from the United States and logged her arrival 3 miles from the breakwater (A. 175a, 177a, 463a, 474a). At 1537 hours, her engine was stopped to allow her to slow down approaching Casablanca (A. 176a, 474a). POTOMAC was then 1.6 miles from buoy CA5 on a course of 125°, heading for the buoy (A. 68a-9a, 177a, 314a; Exh. 13-A, position "B"; A. 461a, Exh. "D"—position marked on chart "stop"—course line from stop position to buoy; A. 513a). About a half mile from buoy CA5, it was observed that the pilot boat was not at buoy CA5 and the pilot signal was sounded on the ship's whistle (A. 512a, 471a).

As POTOMAC approached buoy CA5, her heading was changed to the right to pass astern of an outbound vessel to avoid risk of collision (A. 74a, 178a, 443a-4a). The watch officer checked the chart at that time and reported that there was 9¼ fathoms of water around buoy CA5 (A. 444a). Within several minutes after changing her heading, POTOMAC stranded with her bow raised out of the water on the underwater extension of the Jetty (A. 77a, 209a). POTOMAC stranded at a position about .2 of a mile off the

visible end of the Jetty as established by her radar (A. 88a, 315a [position marked "A"], A. 209a, 445a).

Summary of Argument

Empire contends that POTOMAC's master had not only a right but a duty to use the best navigational aid available to him when he approached Casablanca. The United States breached its duty by failing to correct the primary navigational aid, chart N.O. 51222, to show that the submerged extremity was 400 yards from the visible end of the Jetty Delure and that the visible end had been extended 100 yards further than shown on the chart.

The copy of the chart N.O. 51222 used by the POTOMAC was the latest and largest scale chart available with corrections to December 11, 1971. Nevertheless, POTOMAC stranded in an area designated on the chart as a fairway with depth soundings of 20 feet more than the vessel's draft at the lowest stage of the tide.

Notwithstanding the gross inaccuracy of the chart and the POTOMAC's reliance upon it, the District Court made numerous findings of fault on POTOMAC's master which are not supported by the record and in several instances are in direct conflict with each other.

The evidence overwhelmingly favors the conclusion that the United States not only furnished a bad chart, but that it withheld information that it had and could have furnished, which would have prevented this stranding.

A review of the evidence leads to the inescapable conclusion that the District Court erred seriously in its judgment.

POINTS

I.

The proximate cause of POTOMAC's stranding was the failure of DMA to publish information it had and to correct chart N.O. 51222 which was known by DMA to be inaccurate.

DMA failed to include critical information in the Sailing Directions with respect to the buoyage system and removed a specific warning to mariners that vessels should not pass between buoy CA5 and the end of the Jetty. There is no explanation for the failure to include the buoyage system for Morocco in the Sailing Directions and it is inexplicable that the warning was removed. The most serious omission is that chart N.O. 51222, the primary navigational aid for mariners entering Casablanca, does not show the obstruction to navigation which was known to DMA for two years before the stranding and upon which POTOMAC stranded.

As set forth in Point 3 (this brief, p. 19), chart N.O. 51222 is a large-scale chart graphically displaying the shoals and other dangers to navigation. It is well established that a mariner is negligent if he fails to use the best and latest chart available. See *Protection Marine Ins. Co. Ltd. of London v. United States* (W.D. Ky., 1973), 368 F. Supp. 690, 691-2; *Placid Oil Company v. S.S. Willowpool* (E.D. Tex., 1963), 214 F. Supp. 449, 454; *Continental Oil Company v. M.S. Glenville* (S.D. Texas, 1962), 214 F. Supp. 865, 867, 869-70. POTOMAC had chart N.O. 51222 on board. The date stamp shows it was corrected to December 11, 1971, which meant to a mariner that all the information

DMA had on that date was on the chart. It is undisputed that the chart was the latest and best information available to POTOMAC's navigators at the time she approached Casablanca on February 26, 1972. Bowditch's Practical Navigation states:

"The date of the latest issue [of *Notice to Mariners*] for which hand corrections have been made is stamped in the margin. This is the most important date shown on the chart." (p. 106) (Exh. B)

POTOMAC stranded between the charted end of the Jetty Delure and buoy CA5. The position was fixed by radar at least 400 yards from the visible end of the Jetty, closer to buoy CA5 than the Jetty (A. 190a-1a, 399a [Circled Dot]). The stranded position on the chart shows that there should have been at least 54 feet (9¼ fathoms) of water at that point at the lowest stage of the tide. POTOMAC was drawing only 33 feet of water, 20 feet less than the available charted depth.

The end of the Jetty is marked by the standard chart symbol showing that there is construction on the Jetty (A. 399a, Exh. 111; A. 458a [symbol 49-50]). The construction area is specifically delineated by the broken rectangular line and extends 250 yards from the visible end of the Jetty. Around the end of the Jetty there is a depth curve of three dashes in each group (— — — — —), representing that the water inside the line next to the Jetty is less than 36 feet (6 fathoms) and that outside the line to be 36 feet or more. A mariner using the chart, takes this to mean that there is at least 36 feet of water between buoy CA5 and the 6 fathom curve around the end of the breakwater (A. 18a, 161a-2a,

195a-6a, 295a-96a). If the facts were correct, a vessel drawing 33 feet could pass safely between buoy CA5 and the 6 fathom curve without grounding.

The evidence adduced at trial proved that the chart failed to show the true conditions. Captain Le Chartier, the American Bureau of Shipping representative in Casablanca, conducted an underwater survey and found that the underwater part of the Jetty extended beyond the charted symbol for the area in which the work was being carried on and beyond the 6 fathom curve. He found large blocks extending eastward for more than half the distance between the visible end of the Jetty and buoy CA5 and the depth was only nine meters (A. 65a-66a).

The chart was grossly inaccurate and a trap for the Potomac's master and watch officer who relied on it as they approached the pilot station.

The latest French Chart which was received and examined by DMA in November 1971 showed that the visible end of the Jetty extended about 100 yards further than on chart N.O. 51222 (A. 64a, 188a-9a, 399a [Exh. 111]). Although the difference was noted by DMA's cartographer, a correction to chart N.O. 51222 was not initiated (A. 330a-1a).

When preparing "Change 13" to the Sailing Directions in March 1970, Anderson, DMA's Sailing Directions writer, found from information received from Casablanca that the chart N.O. 51222 was in error and that the underwater extension of the Jetty probably extended to a point more than 500 yards from the visible end of the Jetty shown on the chart (A. 305a [Exh. 2, PM 3550], A. 356a). He wrote "Change 13" for Casablanca and noted that the submerged section extended for 400 yards from the visible end

of the Jetty (A. 368a, 372a). Chart N.O. 51222 shows the construction area to be only about 250 yards in length from the visible end of the Jetty (A. 541a-2a). Although the danger that existed for a mariner relying on the chart was obvious to him, he failed to call it to the attention of anyone else in DMA (A. 381a, 393a-4a). The inaccuracy in the chart could have been rectified by notifying the DMA's Notice to Mariners' section and an immediate notice transmitted to all mariners and the chart corrected by the cartography section of DMA (A. 330a-333a). None of this was done prior to the time POTOMAC's master received the chart in January 1972.

The information Anderson had was confirmed by Captain Le Chartier at the trial (A. 64a-66a, A. 315a, Exh. 13A). The submerged part of the Jetty extended to a point midway between the visible end of the Jetty and buoy CA5 although chart N.O. 51222 clearly shows that the submerged end of the Jetty extends only a distance of 250 yards and terminates inside the 6 fathom curve.

The District Court concluded that the outer extremity of the submerged section of the breakwater extended 400 yards from the visible end of the breakwater (A. 586a). The Court recognized the error in the chart but fastened fault on POTOMAC's master for relying on it rather than the Sailing Directions (A. 589a-90a).

Chart N.O. 51222 shows that the Jetty is under construction. The construction area is clearly delineated by the standard symbol prescribed for DMA charts (A. 458a, [49-50]). It is labeled "work in progress" in the designated area and a 6 fathom curve is shown around the construction area marking the shallow water from the deep (A. 460a—Depth Contours). Those symbols preclude

an interpretation that the construction work extends beyond the 6 fathom curve into the area where POTOMAC stranded. The District Court apparently believed that POTOMAC's master should have disregarded the chart which was corrected to December 11, 1971 by DMA and delivered to the POTOMAC from DMA in January 1972. The only reason the Court had for reaching that conclusion was the 400 yard reference in the Sailing Directions which were written two years before and offer no warning that chart N.O. 51222 was wrong or that it was dangerous to pass between buoy CA5 and the Jetty.

The 400 yard reference in the Sailing Directions becomes meaningless when the chart is examined by a mariner. If work were in progress on the Jetty as noted, it is logical to assume that in the two year period between the writing of the Sailing Directions and the stranding that the 400 yard submerged section of the construction area was shortened by progress toward completion of the visible above water section of the Jetty (A. 338a-9a). DMA's chart record shows that the chart was changed on at least three occasions when the Jetty was extended on the chart as the work progressed (Plaintiff's Exhibit 1, not part of appendix). It is inexplicable that the chart was not corrected again to show the 100 yard extension to the visible end of the Jetty and the 400 yard submerged section.

The chart should have had the latest information on it. POTOMAC's master had no reason to doubt its accuracy or assume, as the District Court did, that the 400 yards referred to in the earlier Sailing Directions meant that the construction work extended beyond the 6 fathom curve into the deep water shown on the chart. That kind of

reasoning would destroy the reliability of all charts issued by DMA.

The Court said that "any prudent master or navigator should have known that the DMA chart was based upon relatively old French Charts." (A. 588a) The Court ignored DMA's chart record for N.O. 51222, which shows that the chart was constructed and changed numerous times from information from many sources including the French Charts as they were corrected. The latest French Chart received was corrected to June 1971 (A. 313a, Exh. 13).

The simple answer to the Court's suggestion is that chart N.O. 51222 should not have been issued to the POTOMAC by DMA if DMA believed the chart was unreliable. Only DMA knew the quality of the information from which the chart was constructed and corrected. It is patently unfair to furnish a master with a chart that he believes displays the latest information available to DMA and upon which he will rely to avoid obstructions to navigation and which is known by DMA to be dangerously inaccurate.

The District Court lost sight of the fact that POTOMAC stranded well clear of the charted obstruction in a position where the chart upon which her master relied showed 54 feet of water. It is inconceivable that POTOMAC's master would have directed her to that position if the chart correctly displayed the submerged section of the Jetty extending more than half way between the visible end of the Jetty and buoy CA-5.

In the absence of findings and conclusions with respect to the failure of DMA to correct the chart and disseminate the information it had, which would have avoided

this stranding, this Court should make findings and conclusions consistent with the evidence before it. The conclusion is inevitable on the evidence, that if DMA had published the obstruction to navigation on its chart as it was known to exist, this stranding would not have occurred.

II.

The United States is liable to Empire for failing to provide POTOMAC's master with the information it had.

It is undisputed that DMA knew that the construction area at the end of the Jetty Delure as shown on chart N.O. 51222 was dead wrong. DMA's Anderson, who knew it was wrong, admitted it was a danger to navigation (A. 382a). There is no credible explanation that can be given to justify the failure of DMA to issue a Notice to Mariners or correct the chart prior to the time it was issued to the POTOMAC.

POTOMAC's master had a right and a duty to rely on the chart as the latest and best navigational aid available to him for navigation into Casablanca. Bowditch's American Practical Navigator says:

"The nautical chart is one of the most essential and reliable aids available to the navigator." (p. 103)

Congress recognized the importance of providing mariners with accurate navigation aids when it enacted 10 U.S.C. § 7391:

"United States Oceanographic Office: establishment and duties:"

"There is attached to the Office of the Chief of Naval Operations a United States Naval Oceanographic Office. The United States Naval Oceanographic Office shall improve means of navigating vessels of the Navy and the merchant marine by providing under the authority of the Secretary of the Navy, *accurate* and inexpensive nautical charts, sailing directions, books on navigation, and manuals of instructions for the use of all vessels of the United States and of navigators generally." (Emphasis added)

The District Court doubted that the principles of law laid down in *De Bardeleben Marine Corp. v. United States*, 5 Cir., 1971, 451 F. 2d 140 are relevant to this case, but side-stepped any meaningful discussion of the faults and liability of the United States by holding that the grounding of the *POTOMAC* was solely caused by the negligence and imprudence of her master and watch officer (A. 588a). We have set forth our points, *infra*, which show that the findings of fact upon which that conclusion was reached are clearly erroneous.

It is well established that the United States is liable for the negligent acts of its agencies and employees under the Suits in Admiralty Act, as amended in 1960, 46 U.S.C. § 741, et seq.; *Afran Transport v. United States* (S.D.N.Y., 1969), 309 F. Supp. 650, 652; affirmed 435 F. 2d 213. In *Indian Towing Co., Inc., et al. v. United States*, 350 U.S. 61 it was held that:

"The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion * * * and

engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning." (p. 69 Emphasis added)

The DMA undertook to furnish mariners of the United States with accurate charts and Sailing Directions without geographical limitation. POTOMAC's master had a right to expect that the charts and nautical literature he received would be accurate and represent all the information DMA had at the time the nautical publications were issued by DMA. If there were any errors or changes in the publication he had a right to expect that he would receive a Notice to Mariners, *De Bardeleben Marine Corp. v. United States, supra*.

DMA issued chart N.O. 51222 to POTOMAC's master in January 1972 with a notation on it that it was corrected to December 11, 1972, with knowledge that the chart did not have on it all the information that DMA had and that the information not provided represented a known danger to navigation.

The failure to provide such vital navigation information it had amounts to negligence on the part of DMA for which the United States is liable.

III.

The District Court's finding that chart N.O. 51220 was the preferable chart to use proceeding into the port of Casablanca is clearly erroneous and must be set aside.

POTOMAC had the latest chart issued and corrected to December 11, 1971 by DMA for the port of Casablanca and the surrounding area (N.O. 51222). The proof at the trial showed she had on board all the latest charts and Sailing Directions available to her navigators at the commencement of the voyage. POTOMAC's master and watch officer were navigating with chart N.O. 51222 as POTOMAC approached Casablanca. The District Court thought that a much smaller scale coastal chart, N.O. 51220 (A. 477a, Exh. R) was the proper chart to use. The Court said:

"For whatever reason, although the approach chart, No. 51220, was aboard the POTOMAC on February 26 it was not consulted or studied by the master or watch officer; this omission, in the judgment of the undersigned, was significant because No. 51220 was the preferable chart, of all the charts aboard, for prudent navigation into Casablanca port." (A. 584a)

Chart N.O. 51220 is a small-scale coastal chart, lacking the detail of the much larger-scale chart for Casablanca and the surrounding sea. The scale on the coastal chart is 1 to 150,000 and on the Casablanca chart 1 to 9,960, the coastal chart covering 15 times the area of the Casablanca chart. A cursory examination and comparison of the two charts can only lead to the conclusion that the Court erred seriously in its judgment that chart N.O. 51220 "was the preferable chart, of all the charts aboard * * *."

Bowditch's American Practical Navigator says:

"2. *Suitability of the scale for the design and intended navigational use.* The same detail cannot be shown on a small-scale chart as on one of a larger scale. For this reason it is good practice to use the largest-scale chart available when in the vicinity of shoals or other dangers." (Exh. B, p. 106).

Chart N.O. 51220 shows only an outline of the Casablanca area and lacks the necessary detail for a navigator to safely avoid the obstructions to navigation approaching and entering Casablanca. It is obvious from the chart itself that it was intended that N.O. 51222 (formerly H.O. 3777) should be used for navigation into Casablanca. The Chart is labeled:

"Cautions"

• • •

"Detailed information has been omitted or generalized in the areas covered by larger scale charts 3721 and 3777. In such areas, only the principal aids to navigation are maintained on this chart by notice to mariners."

A reference to chart H.O. 3777 is printed on the small scale chart N.O. 51220 to the north of the breakwater forming Casablanca Harbor calling attention of those using the small scale chart in that area that H.O. 3777 (N.O. 51222) should be used. The only reasonable conclusion one can reach from these notations on the chart is that it was intended by DMA that the larger scale chart (N.O. 51222) be used when navigating in this area. It is inconceivable that a prudent mariner would use chart N.O. 51220 navigating

in close proximity to Casablanca Harbor when the much larger-scale chart is available, which clearly defines the obstructions to navigation and depths of water not shown on the small-scale coast chart.

Captain Wadleigh, a well-qualified master mariner, testified that N.O. 51220 was a coastal chart and was "too broad a scope" to be used for approaching Casablanca (A. 37a-8a). His testimony was not contradicted by the Government's expert master mariner. The evidence adduced at trial established that chart N.O. 51222, which POTOMAC's master relied upon and used approaching Casablanca was the best chart available.

The District Court's finding that Chart N.O. 51220 was the preferable chart is inexplicable and contrary to its later conclusion that:

"the grounding of the POTOMAC was solely caused by the negligence and imprudence of her master and watch officer (A. 588a) * * * for failing to use the approach chart No. 51222, the obviously best and most applicable chart for approaching the inner harbor; * * *." (A. 589a)

The finding that POTOMAC's master and watch officer failed to use chart N.O. 51222 is totally inconsistent with the finding that:

"They also appeared to have referred to the aforesaid harbor chart, No. 51222." (A. 584a).

It is apparent from the Court's conflicting findings that it was confused as to which chart POTOMAC's master should have been using as it approached Casablanca. Such serious error requires that the judgment be set aside and findings made consistent with the evidence before this Court.

IV.

Neither Bowditch nor the Sailing Directions nor any other maritime text provides a mariner with the buoyage system in Casablanca.

The District Court found that neither POTOMAC's master nor watch officer appear to have paid any attention to the contents of Bowditch dealing with buoys in the ports of the world, including Casablanca (A. 584a-5a); that they appear to have assumed that the Moroccan buoyage system was the same as that in the United States and that they could have determined it by referring to Bowditch or any other acceptable maritime text (A. 586a). Bowditch does not set forth the buoyage system for a single foreign country and specifically says:

"When actually piloting, the navigator should in every case consult the latest nautical literature of the country in question." (A. 451a)

The latest information for the buoyage system in Morocco should have been included in the Sailing Directions at the time they were corrected by Mr. Anderson of DMA when he rewrote the nautical information for Morocco in March 1970. DMA had the information for at least three years before "Change 13" was made to the Sailing Directions. The buoyage system for Morocco was printed on the back side of a disposable pilot chart issued by DMA for the use of vessels navigating in the North Atlantic Ocean in March of 1967 (A. 327a, Exh. 103).

In the absence of information in the Sailing Directions, POTOMAC's master properly assumed that the buoyage sys-

tem was as displayed on Chart N.O. 51222 (A. 467a-8a). Bowditch specifically spells out the significance of the chart symbols:

"Chart No. 1 contains the standard symbols and abbreviations which have been approved for use on nautical charts published by the United States of America." . . . Buys and Beacons—on entering a channel from seaward buoys on starboard side are red with even numbers, on port side black with odd numbers." (A. 457a)

On page 992 of Bowditch (A. 459a) under "Buys and Beacons," symbol 16 shows a black buoy with the notation "port-hand buoy (entering from seaward)".

DMA failed to include in the Sailing Directions the information it had with respect to the buoyage system, yet the Court charged POTOMAC's navigators with knowledge that was not in the primary source of information relied upon by mariners. The Court apparently rejected Empire's expert testimony by a well-qualified master mariner that there was no way of determining from the navigating charts, Sailing Directions or Bowditch that the buoyage system was different than that of the United States (A. 20a-1a). That testimony is undisputed.

An examination of the navigating chart would reasonably lead a mariner to conclude that the buoys on charts N.O. 51220 and N.O. 51222 are port-hand buoys, i.e. buoys which are kept to the vessel's portside entering from seaward (A. 461a, 477a). The large scale Chart N.O. 51222 has a fairway at the entrance to the harbor marked with a dotted line prohibiting anchoring in the fairway (A.

461a). POTOMAC's master and the United States expert were in agreement that the prohibited anchorage area marked the fairway into the harbor (A. 319a-20a, 339a-40a, 399a, 404a-5a). It is precisely marked and extends more than 300 yards to the west of buoy CA5 and is terminated at the 6 fathom curve around the end of the jetty. The conclusion that the buoy should be passed on the porthand is logical under the international system of rules of the road whereby vessels pass port to port, 33 USC 1080. Hence, vessels entering and leaving Casablanca would keep the black buoys on the portside. There are no red opposing buoys on either chart N.O. 51220 or 51222 which, if present, would tell a mariner from a glance at the chart the coloring system in use. Both charts have only black buoys on them.

The Sailing Directions include the buoyage system for the other two countries covered by the volume, but do not mention Morocco (A. 467a-8a). Bowditch merely sets forth the United States system and two other systems in use by some countries (A. 450a-456a, 172a-3a). There is no evidence of any "other acceptable maritime text" used by mariners on United States flag vessels from which the buoyage system for Casablanca could have been determined (A. 586a).

POTOMAC's navigators did not have the information with respect to the buoyage system that DMA had and failed to include in the Sailing Directions. POTOMAC's navigators cannot be charged with that knowledge when it is not published in or on the navigational aids customarily used by prudent mariners.

The Court's finding that POTOMAC's master and watch officer could have determined the buoyage system in Casablanca from Bowditch or some other acceptable maritime text is clearly erroneous and should be set aside.

V.

POTOMAC did not violate the pilotage regulations.

POTOMAC's navigation into Casablanca was not unusual. Both master mariners called as expert witnesses for Empire and the United States testified at trial that they would approach buoy CA5 the same way POTOMAC did. The French Sailing Directions state:

"5.3.2 Pilot Services—The use of pilots is compulsory within the limits of the port.

• • •

"The limits of the port are:

• • •

"North: The 33° 37' 40" w parallel [sic] (buoy CA5)"

• • •

"Pilots board vessels near lighted buoy CA5." (A. 321a)

POTOMAC's master received two messages, one from the vessel's agent and one from the cargo consignee's agent prior to arrival. The consignee's agent's cable received at 1310 hours said:

"BERTHING UPON ARRIVAL PLEASE COME CLOSER BUOY CA5 FOR ENABLING PILOT." (A. 481a, Exh. V-4)

The vessel's agent's message read:

" . . . PILOT BOARDING BUOY CA5 . . . " (A. 482a)

He testified:

"Q. . . . Why did you include that sentence in your cable to the POTOMAC? A. Because it is usual place where pilots are boarding vessels. They are not going beyond buoy CA5 and often they board vessels in inner road." (A. 570a).

The American Bureau of Shipping representative in Morocco, Captain Le Chartier, testified at trial:

"Q. How close to buoy CA5 and in what direction from the buoy do they board the vessel, sir? A. They generally board the vessels south, at 100 to—between 100 to 200 meter south of the buoy. (A. 71a)

. . .

"Q. But my question was do you know if there is anything in the sailing directions, the French sailing directions—

. . .

"A. Well, they say for the pilot—I translate just the interesting sentence here. 'Pilotage is essentially harbor pilotage. The pilot has to embark on board the vessel in the shelter of Jettée De Lure and you may call the pilot through international signals.'" (A. 72a)

The United States expert testified on direct examination:

"Q. Can you tell, where do pilots usually board the vessels? A. They board you close by the sea buoy.

. . .

Q. Is that buoy CA-5? A. That's right.

Q. By close by, what do you mean? A. Well, within 100 yards. • • •" (A. 281a-2a)

Captain Wadleigh, Empire's expert, testified:

"I note his approach to buoy CA-5, which is the pilot's station, and I see nothing wrong in approaching CA-5, which is the pilot station, rather than going to the black and white buoy." (A. 53a)

It is clear from all the evidence and testimony that Casablanca pilots board vessels in the vicinity of buoy CA5. There is no evidence to the contrary. POTOMAC's master was heading for a position in a close proximity to buoy CA5 and was not in violation of any compulsory pilotage rules as POTOMAC approached buoy CA5 and before she stranded.

VI.

POTOMAC approached Casablanca slowly and with due care.

The District Court made a specific finding that POTOMAC "was proceeding at a speed equivalent to nine knots on the ground" at stranding (A. 587a). That finding is unsupported by the evidence. At 1530 hours, POTOMAC's watch officer made an arrival entry in her bell book fixing her position with a bearing of 115° on the Jetty at 3 miles (A. 474a). Her speed in the open sea on arrival was 12 knots (A. 229a-30a). POTOMAC stranded at 1549 hours, 19 minutes later. Her average speed over the bottom between arrival and stranding was 9 knots. The Court apparently stopped with that simple calculation when making its find-

ing. The bell book entries show that the vessel stopped her engine at 1537 hours when POTOMAC was 1.6 miles from the Jetty (A. 474a). The time interval from arrival to the stop engine order was seven minutes and the distance between the two points 1.4 miles. The average speed, therefore, was 12 knots over the bottom. The time interval between the stop engine order at 1537 hours and the stranding at 1549 hours is twelve minutes. The distance is 1.6 miles, hence, an average speed of 8 knots over the bottom. This means that since the vessel was moving at twelve knots prior to 1537, the vessel had to move at a much lower speed as she approached the position in which she stranded to average her speed at 8 knots. It is obvious that if she were going at 12 knots at 1537, she must have been moving at much less than the average 8 knots when she stranded. At 1541 hours, the engine was ordered slow ahead to maintain steerageway (A. 339a). POTOMAC's master testified that on a slow ahead order, the vessel moved at 4-6 knots through the water, which is in line with the average speed over the bottom (A. 288a). This was supported by Captain Le Chartier who observed POTOMAC proceeding slowly toward the entrance to Casablanca (A. 74a).

There was no evidence POTOMAC was scheduled to arrive at 1300 hours or that she was delayed in arriving at Casablanca (A. 583a). Two days before arrival, her master sent a radio message to the agent advising "OUR BEST ETA 1600 TWENTY SIX" (Exh. V-13, A. 485a). She arrived at 1530 hours on the twenty sixth 30 minutes sooner than her ETA. (A. 463a, 474a). There is no evidence that the master was concerned that overtime stevedoring charges would be required unless he docked as quickly as possible (A. 586a-7a). The agent had notified him by radio two days before

arrival—"EXPECT OVERTIME WORK SUNDAY 0700 1500" (Exh. V-11, A. 484a). He was more concerned with being advised where the best anchorage was in order to proceed to it if he could not go to a dock (Exh. V-13, A. 485a, February 24, "PLEASE ADVISE SOONEST THE BEST ANCHORAGE AREA WHILE AWAITING ENTRY"; Exh. V-6, A. 483a, February 26, "IF TOO LATE FOR DOCKING REQUEST BEST ANCHORAGE AREA").

The speed at which POTOMAC approached Casablanca was no different than that described by the United States' own expert (A. 284a, 305a). POTOMAC stopped her engine 1.6 miles from buoy CA5 (A. 305a). The United States expert would have reduced speed to dead slow ahead instead of stopping (A. 284a). When POTOMAC started losing steerageway, her engine was put on slow ahead (A. 339a). These maneuvers cannot be considered imprudent or unexpected and the District Court's conclusions to the contrary are unsupported by the evidence.

CONCLUSION

The sole proximate cause of the stranding of the POTOMAC was the failure of United States to furnish an accurate chart showing the underwater obstruction. The judgment of the United States District Court for the Southern District of New York should be reversed with costs to appellant, and the case remanded with direction to enter judgment on the complaint against the United States of America and award damages to Empire Transport, Inc. with interest thereon and costs.

Dated: New York, New York

September 16, 1974

Respectfully submitted,

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